Office - Supreme Court, U.S.
FILED
JUN 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1607

In the Supreme Court of the United States

OCTOBER TERM, 1982

BUNKFELDT BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether equal protection principles are violated by a rule of the Federal Communications Commission permitting minority-owned businesses to apply to broadcast full time on an AM radio clear channel without meeting certain service requirements applicable to others seeking such permission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Regulations involved	1
Statement	3
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Broadcast Station Assignment Standards In re, 39 F.C.C.2d 645 3

Clear Channel Broadcasting in the AM Broadcast Band, In re, 78 F.C.C.2d 1345, reconsideration granted in part and denied in part, 83 F.C.C.2d 216 aff'd, 670 F.2d 1222 ..... 4, 5

Director v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983) 7

Fullilove v. *Klutznick*, 448 U.S. 448 7-8

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 7

Larson v. *Valente*, 456 U.S. 228 7

Regents of the University of California v. *Bakke*, 438 U.S. 265 ..... 6, 7

United Steelworkers v. *Weber*, 443 U.S. 193 8

Valley Forge College v. *Americans United*, 454 U.S. 464 7

Page

Statute and regulations:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. V) 2000-e *et seq.* :

42 U.S.C. 2000e-2(a) 8

42 U.S.C. 2000e-2(d) 8

47 C.F.R.:

Section 73.37(e)(2) 2, 5
Section 73.37(e)(2)(i) 3
Section 73.37(e)(2)(iii) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1607

BUNKFELDT BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12-A13) is unreported. The opinion of the Federal Communications Commission (Pet. App. A18-A22) is reported at 88 F.C.C. 2d 1696.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12-A13) was filed on January 6, 1983, and rehearing was denied on February 7, 1983 (Pet. App. A14-A17). The petition for a writ of certiorari was filed on March 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

REGULATIONS INVOLVED

47 C.F.R. 73.37(e)(2) provides:

> (e) In addition to a demonstration of compliance with the requirements of paragraph (a), and, as

appropriate, paragraphs (b), (c) and (d) of this section, an application for a new AM broadcast station, or for a major change (see § 73.3571(a)(1) of this chapter) in an authorized AM broadcast station, as a condition for its acceptance, shall make a satisfactory showing, if new or modified nighttime operation by a Class II or Class III station is proposed, that objectionable interference will not result to any authorized station, as determined pursuant to § 73.182(o) of this chapter, and, for all classes of stations, a satisfactory showing as indicated below for the kind of application submitted.

* * * *

(2) Application for a new unlimited-time station or for nighttime facilities by an authorized daytime station or for a major change in facilities resulting in operation on one of the 25 Class I channels listed in § 73.25(a) by any authorized station:

(i) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized AM broadcast station or service from an authorized FM broadcast station with a signal strength of 1 mV/m, or greater, or,

(ii) That the proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and that no FM channel is available for use in that community, or

(iii) That at least 20 percent of the area or population of the community designated in the application receives fewer than two aural services at night from authorized stations, and that no FM channel is available for use in that community, or

(iv) That minority persons hold over 50% of the ownership interests in the applicant for a Class II-B station on one of the 25 Class I channels listed in § 73.25(a), or,

(v) That the applicant proposes to operate a Class II-B station noncommercially on one of the 25 Class I channels listed in § 73.25(a).

STATEMENT

1. In 1973, the Federal Communications Commission ended a four-year freeze on acceptance of applications for new AM facilities and major modifications of existing stations. *In re Broadcast Station Assignment Standards*, 39 F.C.C.2d 645 (1973). However, the Commission adopted rules to preclude applications that, if granted, might cause excessive interference with existing stations without serving any pressing, unmet need. Thus, any applicant for a new unlimited time station or any authorized daytime station seeking to broadcast at night was required to show (39 F.C.C.2d at 681) that objectionable nighttime interference would not occur and that either

a) at least 25% of the area or population that would receive interference free nighttime service from the proposed station did not receive such service from an authorized AM or FM station, or

b) no FM channel was available in the community designated in the application and at least 20% of the community received nighttime service from fewer than two AM or FM stations.

These rules are now embodied in 47 C.F.R. 73.37(e)(2)(i) and (iii).

2. In order to ensure that all parts of the country received service from at least one radio station, the Commission long ago authorized the operation of 25 Class I-A clear channel

AM radio stations. See *In re Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345, 1352 (1980), reconsideration granted in part and denied in part, 83 F.C.C.2d 216 (1980), aff'd, 670 F.2d 1222 (D.C. Cir. 1982). These are high power stations whose "skywave" signal was given maximum protection at night in order to provide "secondary" service to so-called "white areas"—areas not receiving nighttime service from any other AM station (*id.* at 1349-1351). AM signals propagated horizontally provide "primary" or "groundwave" service; their range is limited by the curvature of the Earth (*id.* at 1350). At night, AM signals radiating upward often reflect off the ionosphere, travel back to earth, and provide "secondary" service to points hundreds and sometimes thousands of miles away (*ibid.*). This phenomenon is known as "skywave transmission" (*ibid.*). For a skywave signal to be effective, it must be protected from interference by other stations on the same frequency (*id.* at 1350-1351). Therefore, in order to maximize the coverge of the Class I-A stations, the Commission originally granted them exclusive use of their frequencies. In 1961, the Commission permitted assignment of a single Class II-A station on 11 (later 12) Class I-A channels. *In re Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565 (1961). And in 1980 the Commission opened the way for approximately 100 additional AM stations to operate full time on the clear channel frequencies (78 F.C.C.2d at 1347).

In making this decision, the Commission concluded that several factors, including the growth of FM radio, had decreased the need for long range clear channel service (see 78 F.C.C.2d at 1353-1371). The Commission found that the value of such service was outweighed by the need for programming responsive to local needs (see *id.* at 1364). The Commission noted that many communities with primary service during the day lacked such service at night, or had

only one source of primary service at night, because their local stations were prohibited from broadcasting during those hours in order to prevent interference with skywave transmissions by Class I-A channels (*id.* at 1359).

The Commission also noted the need for more minority-owned stations (*id.* at 1368-1369). The Commission found that its 1973 rules concerning applications for new or increased AM facilities had precluded application by stations proposing to serve minority communities in larger cities. The Commission therefore adopted a rule permitting application by minority-owned enterprises but made clear that such applicants would be "subject to all the procedural and substantive requirements for their comparative consideration with any mutually exclusive applicants meeting any of the other qualifying conditions of the rules" (*id.* at 1369).

Today, those wishing to operate a new unlimited time station and authorized daytime stations wishing to broadcast at night may apply if they meet one of the requirements established in 1973. In addition, 47 C.F.R. 73.37(e)(2) permits such applications if

> (ii) * * * the proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and * * * no FM channel is available for use in that community, or
>
> * * * * *
>
> (iv) * * * minority persons hold over 50% of the ownership interests in the applicant for a Class II-B[1] station on one of the 25 Class I channels listed in § 73.25(a), or,

[1] "Class II stations provide either wide area or more localized service. They must provide substantial interference protection to Class I-A and I-B stations, but receive no protection from the interfering signals of those stations." *In re Clear Channel AM Broadcasting, supra*, 78 F.C.C.2d at 1351-1352.

(v) * * * applicant proposes to operate a Class II-B station noncommercially on one of the 25 Class I channels listed in § 73.25(a).

3. Petitioner Bunkfeldt Broadcasting Corporation, the licensee of a daytime-only AM radio station in Utica, New York, sought to modify its facilities to broadcast full-time on a newly-available clear channel (Pet. App. A18; Pet. 5). Since petitioner could not meet any of the criteria for application, it requested a waiver (*ibid.*). Petitioner's application would have been mutually exclusive with an application previously filed by station WSOQ in North Syracuse, New York. WSOQ is not minority-owned and was able to satisfy the criteria for application (Pet. App. A18-A21). WSOQ opposed petitioner's waiver request (*id.* at A18).

The Commission's Broadcast Bureau denied petitioner's request for waiver, and the Commission denied review (*id.* at A18-A22). In doing so, the Commission rejected (*id.* at A20-A22) petitioner's argument that the rule permitting application by minority-owned enterprises violated equal protection principles and concluded that its rule was fully consistent with this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). The court of appeals affirmed without opinion (Pet. App. A12-A13) and denied rehearing (*id.* at A14-A17).

ARGUMENT

Petitioner challenges (Pet. 7-10) the constitutionality of the rule permitting minority-owned applicants to apply to broadcast full time on a newly-opened clear channel frequency without meeting the criteria applicable to others seeking such permission. However, petitioner lacks standing to challenge this rule; accordingly, further review by this Court is not warranted.

"[A]t an irreducible minimum, Art. III [of the Constitution] requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' " (*Valley Forge College* v. *Americans United*, 454 U.S. 464, 472 (1982), quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)). See also, *e.g.*, *Director* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 7; *Larson* v. *Valente*, 456 U.S. 228, 238-239 (1982). In this case petitioner suffered no harm as a result of the Commission's rule regarding applications by minority-owned enterprises. If that rule had not been issued in 1980, petitioner's application would still have been rejected for failure to meet any of the previously adopted requirements. Furthermore, in seeking to broadcast at night on one of the newly-available clear channels, petitioner was competing with non-minority-owned stations that satisfied the Commission's long-established service requirements. Petitioner's attack upon the provision concerning minority-owned applicants seeks to derive a benefit from an issue that has no bearing upon this case.

The flaw in petitioner's argument is illustrated by *Regents of the University of California* v. *Bakke, supra*, the case upon which petitioner relies (Pet. 9-10). In *Bakke*, a white applicant denied admission to medical school challenged the school's special admissions program for minority applicants. Concluding that the particular program at issue violated equal protection, the Court held that Bakke was entitled to admission because the medical school could not show that "but for the existence of its unlawful special admissions program, [Bakke] still would not have been admitted" (438 U.S. at 320 (opinion of Powell, J.); see also *id.* at 410 (opinion of Stevens, J.)). Injury in fact was likewise alleged or shown in other cases involving constitutional challenges similar to petitioner's. For example, in *Fullilove*

v. *Klutznick*, 448 U.S. 448 (1980), upholding a law requiring that 10% of federal funds for certain public works projects be awarded to minority-owned businesses, the parties challenging that law alleged that it had caused them economic injury (*id.* at 455). In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), holding that the affirmative action plan contained in a collective bargaining agreement did not violate provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and (d), senior white employees alleged that operation of the plan "had resulted in junior black employees' receiving training in preference to senior white employees" (443 U.S. at 199). In the present case, by contrast, even if the special rule for minority-owned applicants had never been adopted, petitioner would nevertheless have been precluded from applying for authorization to broadcast at night on one of the newly available clear channel stations. And if that rule were now held invalid, petitioner would still be barred from night broadcasting. Accordingly, petitioner lacks standing to raise the issue upon which he relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Repectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

DOJ-1983-06